No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TEXACO INC.,

Petitioner,

—v.—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE POSITION OF PETITIONER

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the position of petitioner. Counsel for petitioner has consented to the filing of this brief; counsel for respondents has not.

INTEREST OF THE *AMICUS*

MVMA is a trade association organized as a not-for-profit New York corporation, and is composed of companies engaged in the manufacture and sale of motor vehicles in the United States. The member companies[1] build over ninety-seven percent of all motor vehicles produced in the United States.[2]

Motor vehicles are complex, costly, and durable products which require sophisticated servicing during the life of the vehicle. The consumer requires reliable and convenient service and replacement parts, and the manufacturer must meet these needs in order to maintain consumer goodwill and generate repeat business.

Motor vehicle manufacturers have developed varying distribution systems to meet these needs efficiently at every stage of the ownership life cycle. These systems involve the sale of thousands of service and replacement parts to the dealers who originally sold the motor vehicles to consumers, and in many cases also to other retailers of service and replacement parts, and to wholesalers who resell parts to sub-distributors, retailers and repair facilities. Motor vehicle manufacturers compete among themselves for the sale of service and replacement parts through these channels, and with numerous other domestic and foreign parts manufacturers as well. These two- and three-channel distribution systems are imperiled by the decision below which, if not reversed, threatens to impair the continuation of distribu-

1 The members of MVMA are: Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Manufacturing, Inc.; Navistar International Transportation Corp.; PACCAR Inc.; and Volvo North America Corporation.

2 The various MVMA members also manufacture motor vehicle service and repair parts, as well as such diverse products as farm, industrial, lawn and garden tractors, other agricultural equipment, construction and mining machinery, locomotives, railroad railing stock, winches, and gasoline and diesel engines for numerous industrial and agricultural uses.

tion systems that have developed in response to competitive market forces, and to raise the cost of motor vehicle parts substantially.

The decision below exposes motor vehicle manufacturers to massive legal uncertainties that threaten their efforts to develop and maintain the efficient and dependable distribution networks that are crucial to the continued success of their basic businesses. The Ninth Circuit's rule prevents motor vehicle manufacturers from tailoring their distribution systems as necessary to promote interbrand competition. If the decision below is not reversed, MVMA's members will no longer be certain that functional discounts offered on a non-discriminatory basis to all competing wholesalers will insulate them from the risk of liability to retailers under the Robinson-Patman Act. Such legal uncertainty will chill the ability of manufacturers to develop systems intended to create efficiencies.

The Ninth Circuit's requirement that wholesaler discounts must be cost-based disregards the economic fact that such discounts are to a great extent offered by motor vehicle manufacturers as an incentive for the wholesaler's services, and may or may not be fully reflective of the cost savings to the manufacturer. Moreover, the decision below has the perverse effect of punishing a manufacturer for its natural desire to find the most efficient (*i.e.*, lowest-cost) wholesalers, because it is precisely those wholesalers that can be expected to "pass on" cost savings and thus place the manufacturer in danger of being found liable under the Robinson-Patman Act. The Ninth Circuit rule will thus lead to the suboptimal distribution of motor vehicle service and maintenance parts and higher costs to consumers.

For these important reasons, MVMA respectfully requests that the Court accept and consider the accompanying brief.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTEREST OF THE *AMICUS*

Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") is a trade association organized as a not-for-profit New York corporation, and is composed of companies engaged in the manufacture and sale of motor vehicles in

the United States. The member companies[1] build over ninety-seven percent of all motor vehicles produced in the United States.[2]

Motor vehicles are complex, costly, and durable products which require sophisticated servicing during the life of the vehicle. The consumer requires reliable and convenient service and replacement parts, and the manufacturer must meet these needs in order to maintain consumer goodwill and generate repeat business.

Motor vehicle manufacturers have developed varying distribution systems to meet these needs efficiently at every stage of the ownership life cycle. These systems involve the sale of thousands of service and replacement parts to the dealers who originally sold the motor vehicles to consumers, and in many cases also to other retailers of service and replacement parts, and to wholesalers who resell parts to sub-distributors, retailers and repair facilities. Motor vehicle manufacturers compete among themselves for the sale of service and replacement parts through these channels, and with numerous other domestic and foreign parts manufacturers as well. These two- and three-channel distribution systems are imperiled by the decision below which, if not reversed, threatens to impair the continuation of distribution systems that have developed in response to competitive market forces, and to raise the cost of motor vehicle parts substantially.

Specifically, the United States Court of Appeals for the Ninth Circuit affirmed a verdict against an oil company that

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1 The members of MVMA are: Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Manufacturing, Inc.; Navistar International Transportation Corp.; PACCAR Inc.; and Volvo North America Corporation.

2 The various MVMA members also manufacture motor vehicle service and repair parts, as well as such diverse products as farm, industrial, lawn and garden tractors, other agricultural equipment, construction and mining machinery, locomotives, railroad railing stock, winches, and gasoline and diesel engines for numerous industrial and agricultural uses.

sold products to wholesalers at lower prices than to retailers, declaring that the long-standing rule that the Robinson-Patman Act permits manufacturers to sell to wholesalers at lower prices than to retailers is not absolute. It held that there may be a violation when the discount is not closely tied to a particular wholesaler's distribution costs and is "passed on" by the wholesaler to retailers in the form of lower prices than those charged by the manufacturer to its direct retailer customers.

The decision below exposes motor vehicle manufacturers to massive legal uncertainties that threaten their efforts to develop and maintain the efficient and dependable distribution networks that are crucial to the continued success of their basic businesses. In direct contravention to the teachings of this Court in its Sherman Act decisions, the Ninth Circuit's rule prevents motor vehicle manufacturers from tailoring their distribution systems as necessary to promote interbrand competition. If the decision below is not reversed, MVMA's members will no longer be certain that functional discounts offered on a non-discriminatory basis to all competing wholesalers will insulate them from the risk of liability to retailers under the Robinson-Patman Act. Such legal uncertainty will chill the ability of manufacturers to develop systems intended to create efficiencies.

The Ninth Circuit's requirement that wholesaler discounts must be cost-based disregards the economic fact that such discounts are to a great extent offered by motor vehicle manufacturers as an incentive for the wholesaler's services, and may or may not be fully reflective of the cost savings to the manufacturer. Moreover, the decision below has the perverse effect of punishing a manufacturer for its natural desire to find the most efficient (*i.e.*, lowest-cost) wholesalers, because it is precisely those wholesalers that can be expected to "pass on" cost savings and thus place the manufacturer in danger of being found liable under the Robinson-Patman Act. The Ninth Circuit rule will thus lead to the suboptimal distribution of motor vehicle service and maintenance parts and higher costs to consumers.

SUMMARY OF ARGUMENT

The decision of the court of appeals is contrary to the long-established rule that manufacturers may offer lower prices to wholesalers than to direct retail accounts without fear of liability to customers under the Robinson-Patman Act. If this Court approves the significantly expanded interpretation of the Robinson-Patman Act enunciated by the Ninth Circuit, MVMA's members would be severely restricted in their ability to adopt distribution systems that provide the flexibility necessary to distribute thousands of service and repair parts efficiently to consumers. Instead, they will be forced to adopt systems that may not adequately reward wholesalers, particularly efficient ones, for the services they perform. Such a perverse result would be unprecedented and repugnant to prior antitrust decisions of this Court.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS EXPANDS ROBINSON-PATMAN LIABILITY IN DIRECT CONTRAVENTION OF ANTITRUST PRINCIPLES ESTABLISHED BY THIS COURT

In the decision below, the court of appeals held that a manufacturer that sells a product at the same price to all competing wholesalers may be liable under the Robinson-Patman Act to a direct-purchasing retailer if the discount granted at the wholesaler level is not found to be "cost-based" and a wholesaler passes on all or a portion of that discount to retail customers that compete with the direct-purchasing retailer. 842 F.2d at 1038. Such a result is unprecedented; all prior court of appeals decisions had confirmed the absolute right of a manufacturer to charge wholesalers lower prices than retailers because they operate at different levels of trade.[3]

3 *See, e.g., White Indus.* v. *Cessna Aircraft Co.*, 845 F.2d 1497 (8th Cir.), *cert. denied*, 109 S. Ct. 146 (1988); *Dart Indus.* v. *Plunkett Co.*, 704 F.2d 496, 499-500 (10th Cir. 1983); *Edward J. Sweeney & Sons, Inc.* v. *Texaco Inc.*, 637 F.2d 105, 120-22 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019, 1024 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

The Robinson-Patman Act is extended beyond its legitimate scope if liability is imposed upon a manufacturer for price disparities that are attributable only to the intervening pricing decisions of its distributors. If manufacturers were required to monitor such intervening pricing decisions—which is the practical effect of the Ninth Circuit's decision—it would threaten the independent pricing freedom of wholesalers in a way that is counter to this Court's long-standing condemnation of resale price maintenance. *See, e.g., 324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 342-43 (1987). This Court should not condone such a result.

As this Court has observed, the Robinson-Patman Act was designed to deter suppliers from charging different prices to customers at the same level of distribution.[4] *See Abbott Laboratories* v. *Portland Retail Druggists Ass'n*, 425 U.S. 1, 12 (1976) (focus of Act on competition "at the same functional level"); *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 520 (1963) (purpose of Act "to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on an equal competitive footing so far as price is concerned"). It is possible for a violation to occur when the favored and disfavored purchasers do not actually compete; for example, when a supplier discriminates among wholesalers that do not compete with each other, but whose retail customers compete. *See Falls*

4 There is no danger that confining the Act to its intended scope will invite its circumvention by manufacturers or retailers controlling dummy wholesalers. In such a situation, the dummy wholesaler's customers could be deemed direct customers of the supplier. *See Purolator Prods., Inc.* v. *FTC*, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968); *General Auto Supplies, Inc.* v. *FTC*, 346 F.2d 311 (7th Cir.), *cert. dismissed*, 382 U.S. 923 (1965). As the Seventh Circuit noted in *Purolator Products*, "If the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then *he has no power by his own action to prevent an injury to competition.*" 352 F.2d at 883 (emphasis added, citation omitted).

City Industries v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983). Nevertheless, in such a situation the supplier has discriminated between purchasers at the same level of distribution.

Finally, as detailed in petitioner's brief, neither *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969), nor *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), supports the decision below. In *Perkins*, the favored purchaser owned a direct competitor of the disfavored purchaser, and liability could therefore have been based on a discrimination at the same level of trade. 395 U.S. at 651 (Marshall, J., concurring in part and dissenting in part). In relevant part, *Morton Salt* involved a claim that *wholesalers* were disfavored buyers as against direct-account retail customers. Thus, there was no possibility, as here, that the harm to competition depended upon the intervening pricing decisions of wholesalers. Indeed, the Federal Trade Commission order approved in *Morton Salt* specifically permitted different pricing between wholesalers and retailers, provided the retailers were not charged *less* than the wholesalers. 334 U.S. at 51. The decision below turns that decision and the statute itself on its head. Quite simply, there is no supporting precedent in this Court for the decision below.

II. THE DECISION OF THE COURT OF APPEALS WILL DRASTICALLY LESSEN THE ABILITY OF MVMA MEMBERS TO ADOPT EFFICIENT DISTRIBUTION SYSTEMS

A. The Practical Consequences of the Decision Below Are Contrary to Basic Sherman Act Principles.

If the decision below is upheld, MVMA members may be subject to Robinson-Patman Act liability if an independent wholesaler opts to utilize part of a functional discount to undercut the manufacturer's price to retailers, and a jury later concludes that the wholesale discount was not totally cost-based. In order to avoid liability under this standard, the manufacturer must either: eliminate the functional discount entirely; reduce it to the point of confidence (if possible) that it cannot be underpriced by any wholesaler customer; or tailor it precisely to the

costs of each individual wholesaler customer. None of these alternatives is practical or acceptable.

The elimination or substantial reduction of functional discounts would discourage many wholesalers from agreeing to distribute motor vehicle service and repair parts. Motor vehicle manufacturers lack the ability to supply directly the thousands of retailers throughout the United States who now purchase parts through intermediaries. As a result, motor vehicle parts needed for repair and maintenance would be less widely distributed, leading to reduced retail competition and increased prices. Of special concern to MVMA, the result will inevitably be a loss of consumer good will which will hamper future motor vehicle sales.

The alternative of requiring manufacturers to monitor their wholesalers' costs is impossible. MVMA's members dealing through wholesalers would have to obtain data about each wholesaler's costs and pricing strategies. Even if this were possible without risking serious legal exposure under the Sherman Act, it would involve enormous administrative burdens that would reduce a manufacturer's ability to operate its business on a daily basis—particularly its basic business of selling motor vehicles. Moreover, once the manufacturer did obtain the requisite data, it would be subject to potential liability for discriminating among wholesalers if it failed to correlate the discount precisely to a particular wholesaler's costs and thereby competitively disadvantaged that wholesaler.[5]

Compliance with the Robinson-Patman Act, as envisioned by the Ninth Circuit, would lessen price competition and marketing efficiency. Wholesalers with the lowest costs, and thereby most able to resell at the lowest prices, would be the most likely

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5 Even if the manufacturer would eschew attempts at cost-based price differences, the problem of monitoring wholesalers' pricing strategies would remain. Indeed, it is not immediately apparent how a member of MVMA would be required to respond upon learning that a wholesaler reduced prices below those charged by the manufacturer to its direct retail accounts. What is certain is that substantial litigation will be required before the parameters of such a rule would be established.

to have their functional discounts drastically reduced. Surely the Robinson-Patman Act does not require the punishment of efficiency and vigorous price competition. Interpreting the Robinson-Patman Act in this manner undercuts the procompetitive purposes of the Sherman Act, in contravention of this Court's mandate that such interpretations are to be avoided. *See, e.g., Great A&P Tea Co.* v. *FTC*, 440 U.S. 69, 80 n.13 (1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 458 (1978); *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61, 74 (1953).

B. The Decision Below Threatens Legitimate Distribution Practices of Motor Vehicle Manufacturers.

The rule announced below threatens to result in a flood of litigation over fundamentally sound distribution practices that are vitally important to many of the country's largest manufacturers, including the members of MVMA. The rigidity of the Ninth Circuit rule ignores the commercial reality that neither wholesalers nor retailers are monolithic blocks of similarly-situated businesses.

This is particularly apparent with respect to the distribution of service and maintenance parts for motor vehicles, which are sold either directly or, in many cases, through distributors and sub-distributors to various categories of retailers, including automobile dealers, national and regional retail chains, independent retailers, and repair shops. MVMA members must be able to tailor their distribution systems for the vast number of parts involved as necessary to ensure the broadest possible availability of products to meet their warranty obligations, and otherwise to facilitate repairs and replacements throughout the life of a motor vehicle. This simply cannot be accomplished solely through direct sales to retailers.[6] For many MVMA members, wholesalers are essential to meet these diverse needs; and functional discounts are required to attract and retain wholesaler customers.[7] This is the only way to ensure that parts will rapidly reach the many thousands of customers to whom such parts would not otherwise be readily available for the servicing and repair of motor vehicles.

However, affirmation of the decision below may result in dual distribution being too hazardous legally for MVMA members, creating an unacceptable dilemma for manufacturers and negative consequences for consumers. On the one hand, eliminating sales to wholesalers would result in a drastic decrease in the number of retailers from which motor vehicle service and repair parts could be obtained, leading to reduced retail competition and higher retail prices. On the other hand, eliminating direct sales to retailers would isolate the motor vehicle manufacturer from its dealers,[8] depriving it of the ability to protect a major component of its competitiveness—the serviceability of its vehicles.

MVMA strongly believes that its members ought not be precluded from supplying their products in the manner they deem most efficient in the context of their individual businesses. *GTE Sylvania* and other recent Sherman Act decisions of this Court

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6 With respect to "crash" parts—fenders, bumpers and the like—automotive dealers themselves often function as wholesalers to body and collision shops. Since this broadens distribution of the manufacturer's motor vehicle parts, MVMA members must remain free to grant dealers an adequate functional discount to encourage them to supply their potential competitors. This efficient and procompetitive practice will also be imperiled by the decision below.

7 It is simplistic to argue that market forces should usually prevent liability because a manufacturer would not find it profitable to sell to wholesalers at discounts great enough to enable them to undercut the manufacturer's prices to direct retailer accounts. A direct-distributing manufacturer uses wholesalers to reach different types of retailers—retailers to whom it is too expensive to sell directly, either because of their size, geographic location or peculiar business needs. The functional discount is primarily an incentive for the wholesaler to reach this wide variety of incremental retail outlets. Thus, the amount of the functional discount will only coincidentally be related to the manufacturer's theoretical cost of distributing directly to any particular retailer.

8 In truth, the option of eliminating direct supply relationships with motor vehicle dealers is not available to MVMA members, because the complex web of legal and commercial relationships between these motor vehicle manufacturers and their dealers precludes the use of independent intermediaries.

apply this very proposition.[9] Yet the decision of the court of appeals, if permitted to stand, would have that constraining effect. An effective parts distribution system is critical to the continued competitiveness of the motor vehicle industry, bu. the decision below threatens to make distribution of such products needlessly more expensive and inefficient. MVMA respectfully urges this Court to forestall this result by reversing the Ninth Circuit in this case.

9 *See Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 57-58 (1977) (courts should carefully examine competitive effects before condemning efficient distribution practices that are widely used). *See also Business Electronics Corp.* v. *Sharp Electronics Corp.*, 108 S. Ct. 1515, 1520 (1988) ("market-freeing" effect of *GTE Sylvania* should not be frustrated by legal rules); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984) ("management's exercise of its independent business judgment" regarding distribution matters should not be interfered with except in the face of solid evidence of illegality).

CONCLUSION

For the reasons set forth above, Motor Vehicle Manufacturers Association of the United States, Inc. urges that the decision of the Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

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